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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 492

WILLIAM B. CROSS, *Petitioner;*

vs.

M. R. PASLEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, William B. Cross, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on September 2, 1959, as modified on September 22, 1959.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Missouri, Western Division, dated March 25, 1958, is not reported but is set out in the printed record, pages 3-9. On June 8, 1959, the United States Court of Appeals for the Eighth Circuit filed an opinion, reported in 267 F.2d 824, directing the District Court to make additional findings of fact and conclusions of law. On August 13, 1959, the District Court filed additional findings and conclusions, which are not reported but which are set out in the Appendix, *infra*, p. A21. On September 2, 1959, the said Court of Appeals filed an opinion which is not yet officially reported but which is set out in the Appendix, *infra*, page A5. Pursuant to a petition for rehearing, the said Court of Appeals filed a supplemental opinion, dated September 22, 1959, which is not yet reported but which is set out in the Appendix, *infra*, page A18.

JURISDICTION.

The judgment sought to be reviewed herein was dated and entered September 2, 1959. A petition for rehearing was filed by petitioner and the court below entered an order, dated September 22, 1959, denying the petition for rehearing but modifying the order dated September 2, 1959. On September 25, 1959, the court below stayed its mandate for a period of thirty days for the purpose of permitting the filing of this petition for writ of certiorari.

Jurisdiction is conferred on this court by 28 U.S.C., Section 1254.

QUESTIONS PRESENTED.

1. Where the owners of undivided interests in oil leases entered into a Joint Operating Agreement containing all the elements and attributes of a joint adventure between them, does a stipulation therein that the agreement shall not be deemed a joint adventure override all the other provisions and establish as a matter of law that there could be no joint adventure?

2. Where the parties have agreed that a specified amount of the investment by each shall be allocated to his acquisition of an undivided interest in an oil leasehold and that the balance of such investment shall be allocated to development expenses, and the parties report income taxes in accordance with said allocation, can the respondent thereafter in a suit under the Missouri Securities Law (based on non-registration of the sale of the leasehold interest) recover the aggregate amount paid by him, or is he limited to recover only the portion allocated by the agreement as payment for his leasehold interest?

3. When Missouri decisions uniformly hold that a "tender" requires tender of physical delivery, may a Federal court, in deciding a case under the Missouri Securities Law, ignore said Missouri decisions merely because said decisions were not decided under said statute, and proceed to hold that a tender under the Missouri Securities law does not require any tender of actual delivery of an executed document re-assigning the real estate interests involved?

4. Is respondent estopped to recover back his investment where he invested with petitioner in three oil wells, all of which proved commercially unsuccessful, and thereafter he invested with petitioner in two more oil wells,

which likewise proved unsuccessful, and thereafter he invested with petitioner in a sixth oil well, which likewise proved unsuccessful, and thereafter he invested with petitioner in two additional oil wells which likewise proved unsuccessful, and thereafter he invested with petitioner in still a ninth oil well, and respondent made no claim for a return of any part of his investment until after all costs had been incurred and after the final result of all drilling was known and the value of all leaseholds had thereby become greatly depreciated, and where petitioner had not practiced any misrepresentation, concealment or fraud of any kind?

5. In this case involving the construction of a Missouri statute in respects not previously passed upon by the Missouri courts, should the court below have withheld its decision pending decision of a companion case by the Missouri Supreme Court involving the identical transactions; and if the Missouri Supreme Court in said companion case now under advisement decides contrary to the court below, should this court reverse the court below so as to make the result in this case consistent with the state law?

STATUTE INVOLVED.

This case involves the interpretation of the Missouri Securities Law (commonly referred to as "Blue Sky Law"), Chapter 409, R.S.Mo. 1949. The portions of that statute with which this case is concerned are as follows:

Sec. 409.020(3), R.S.Mo. 1949 provides:

> "The term 'security' or 'securities' means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or par-

ticipation in any profit-sharing agreement; collateral trust certificate; preorganization certificate, receipt, or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; beneficial interest in or title to property or profits; any certificate, contract, receipt or instrument whatsoever representing or constituting evidence of, or secured by, title to or interest in any oil, gas or mining lease, royalty, or deed, and interest, units or shares in any such lease, royalty, or deed; or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing; provided, however, that the term 'security' or 'securities' shall not include any stock, scrip or other certificate of interest heretofore or hereafter issued by any building and loan association or savings and loan association incorporated under the laws of this state or of the United States and subject to examination, supervision and control by either or both."

Section 409.030, R.S.Mo. 1949, provides:

"No securities except of a class exempt under any of the provisions of section 409.040 hereof or unless sold in any transaction exempt under any of the provisions of section 409.050 hereof shall be sold within this state unless such securities shall have been registered by notification or by qualification as herein defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the notice under section 409.060 or the application under section 409.070 for registration of such stock includes a statement that such rights are to be issued."

Section 409.240, R.S.Mo. 1949, provides:

"Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller who shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller in person or in open court of the securities sold or of the contract made for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorney's fees in any action or tender under this section; provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale; and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by such purchaser, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed:

"(1) In case such securities consist of interest bearing obligations at the same rate as provided in such obligations; and

"(2) In case such securities consist of other than interest bearing obligations at the rate of six per cent per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser."

STATEMENT OF THE CASE

This case was instituted by respondent under the Missouri Securities Law (commonly referred to as "Blue Sky Law"), Chapter 409, R.S.Mo. 1949, and also under the Federal Securities Act of 1933, to recover sums invested by him in a series of nine oil wells. The jurisdiction of the Federal District Court to determine whether the transactions were in violation of the Missouri Blue Sky Law was invoked because of diversity of citizenship and the amount involved. As to the alleged violation of the Federal statute, jurisdiction was invoked under 15 U.S.C., Sec. 77(v).

The facts concerning these investments are as follows: Petitioner and one Chasteen had acquired three leaseholds in southwest Kansas under the partnership name of C & C Petroleum Co. However, each of them had his principal business activities in fields other than oil and they were unable to finance the development of said leaseholds by themselves. They, therefore, sold three-fourths of the working interests therein to others. Respondent was one of such purchasers, and he agreed to take a 1/32d interest (R. 19). It was understood between all of the parties that C & C Petroleum Co. was to be the Operator and would have active management of the drilling. However, the Joint Operating Agreement (R. 23-49) signed by all parties with respect to each leasehold provided extensive rights and obligations upon each of the co-owners, including the right of a majority of the co-owners to discharge C & C Petroleum Co. as Operator at any time upon thirty days' notice. The Joint Operating Agreement also contained a stipulation that it should not be construed as creating a joint venture or other relationship whereby any party might be held liable for the acts

of any other party. The letter of confirmation (R. 19) with respect to the acquisition of the leasehold interests contained a similar stipulation. The various co-owners actually exercised the rights granted to them by the Joint Operating Agreement, and made pro rata payment of development costs as they were incurred.

At the time each investor acquired his leasehold interest, there was a written agreement under which an allocation was made of the consideration paid, a specific sum being allocated to acquisition of the leasehold interest and the balance being allocated to development costs (R. 20). In making out their Federal income tax returns, the investors treated said portion allocated to leasehold acquisition as their only capital investment, and the balance of the money paid by them was reported as deductible expense (R. 84, 87, 16-17). Formal assignments were made to each of the investors of their respective leasehold interests and those assignments were duly recorded (R. 21-23).

Test wells were drilled and completed on each of the three original leaseholds, and petitioner paid his share of the completion costs. All of those wells proved commercially unsuccessful, except that one of these wells did produce gas in quantities sufficient for commercial sale. After the first three wells had been completed and the results known, all of the investors, including respondent, agreed to the drilling of two additional wells on the same leaseholds (R. 56). With respect to each, petitioner paid his full share of expenses. Those two development wells proved unsuccessful. Thereafter various of the investors, including respondent, agreed to join in acquiring a fourth leasehold, called the Padgett lease (R. 101, 50). A well was drilled on said leasehold with respect to which petitioner paid his share of completion costs, but the

well proved unsuccessful. Thereafter respondent and others of the investors investigated two additional leaseholds in Oklahoma, known as the Jones and the Estate leases, and they then agreed with petitioner to join in the acquisition and development of those leases (R. 91, 77). Test wells were drilled on those leases with petitioner paying his share of completion costs, but both of those wells ultimately proved unsuccessful. Thereafter respondent and the other investors agreed to the drilling of an additional well on the Jones lease, in which petitioner paid his full share of expenses, but that well proved unsuccessful. With respect to all of these wells the same standard documents were used, consisting of a letter of conformation, a formal assignment of leasehold interest and a Joint Operating Agreement (R. 52, 53, 54, 82, 97). In each instance there was an allocation between leasehold costs and development costs (R. 54, 59, 83, 86, 89).

After all nine wells had been completed, all the money had been spent, and the various leaseholds had become less valuable, respondent decided he wanted his money back and brought this suit (R. 9). Both in his complaint and at the trial his counsel stated that respondent was tendering back whatever he had received, but respondent never offered any executed deed re-assigning the various leasehold interests which had been transferred to him. The trial court entered judgment in favor of respondent for the full amount which he had paid, without regard to the fact that the parties had allocated by their written agreement a much lesser sum as being the amount paid by respondent for his interests in the various leaseholds.

About the same time that respondent filed this case, others of the investors had filed similar cases in the state court. After the trial herein and after the appeal had been lodged in the court below, one of those companion

cases, styled *Covert* v. *Cross*, was tried in the Circuit Court of Jackson County, Missouri. An appeal was taken from the judgment in that case to the Missouri Supreme Court. Your petitioner thereupon filed a motion in the court below to postpone the hearing of the instant case until the Missouri Supreme Court should decide the companion case of *Covert* v. *Cross*. Said motion was overruled.

On June 8, 1959, the court below remanded this case to the trial court for supplemental findings and conclusions of law. After such supplemental findings had been made and filed by the District Court, the court below entered its opinion and order of affirmance on September 2, 1959. Petitioner filed a motion for rehearing, pointing out that the case of *Covert* v. *Cross* was set for oral argument before the Missouri Supreme Court *en banc* on October 5, 1959, and requesting postponement of final decision in the instant case until the decision of the Missouri Supreme Court. Said motion for rehearing was overruled on September 22, 1959, although the court below did at said time modify its opinion and order of September 2d.

The companion case of *Covert* v. *Cross* was argued orally before the Missouri Supreme Court *en banc* on October 5, 1959, and is presently under advisement by said court.

REASONS FOR GRANTING THE WRIT

1. The court below rested its decision solely on the Missouri Blue Sky Law, expressly excluding any consideration of the Federal Securities Act (Appendix page A13). The validity and correctness of the decision below, therefore, depends entirely on whether it correctly interpreted the said Missouri statute.

There is presently pending before the Missouri Supreme Court the case of *Covert* v. *Cross*, No. 47,462, which is a companion case to the instant case and which involves the same documents and transactions as those which are involved here. The Covert case was argued orally before the Missouri Supreme Court *en banc* on October 5, 1959, and will be decided in a short time. Said decision by the Missouri Supreme Court *en banc* will constitute a final and definitive ruling by the highest court of Missouri on the various issues of state law which are being considered in that case as questions of first impression in Missouri. If the Missouri Supreme Court rules for petitioner in the Covert case, such decision will be binding on the Federal courts and should demand a reversal of the decision below.

2. The court below "was inclined to the view" and assumed that the Missouri Blue Sky Law does not apply to transactions between joint adventurers (Appendix, page A11). However, it held that respondent was not a party to a joint adventure because of the stipulation in the Joint Operating Agreement to the effect that the instrument was not to be construed as a joint venture or other relationship whereby any one party could be held liable for the acts of another party, and the stipulation in the letter of confirmation to the effect that the relationship of the parties should be that of "independent contractors."

This same issue is being presented to the Missouri Supreme Court in the case of *Covert* v. *Cross*, No. 47,462. It is significant that during the course of the oral argument of that case, Judge Storckman of the Missouri Supreme Court stated from the bench that he could not understand how the relationship between the various co-owners could be that of "independent contractors." This remark by Judge Storckman may forecast a ruling by the Missouri

Supreme Court sustaining our contention that said provisions in the letter of confirmation and in the Joint Operating Agreement were intended to apply only as between the Operator and the Non-Operators and were not intended to have any application as between the co-owner Non-Operators *inter se*. The decision on this point by the Missouri Supreme Court will, of course, be binding on the Federal courts.

Moreover, the ruling of the court below giving controlling importance to these stipulations is contrary to decisions of this Court and of the Missouri courts. It is established law in this Court that parties cannot change their true relationship by calling that relationship something else. Thus, for example, this Court held in *Herryford* v. *Davis*, 102 U.S. 235, l.c. 244-5:

> "* * * It is quite unmeaning for parties to a contract to say that it shall not amount to a sale, when it contains every element of a sale and transmission of ownership."

To like effect is *Union Pacific Ry. Co.* v. *Chi., R. I. & P. Ry. Co.*, 163 U.S. 564, l.c. 582; *Kolb* v. *Golden Rule Baking Co.*, 222 Mo. App. 1068, 9 S.W.2d 840, l.c. 842.

Still further, the opinion of the court below is essentially in conflict with the recent opinion of the United States Court of Appeals for the Tenth Circuit in *Woodward* v. *Wright*, 266 F.2d 108. In the Woodward case it was held that the plaintiffs could not recover under the Federal Securities Act, for their investment in non-registered fractional shares in an oil well, on the bare ground of non-registration. The essence of the decision was that the plaintiffs, Non-Operators, had the right to discharge the defendant as the Operator and, therefore, the defendant was not in "control" of the enterprise. In the instant case,

respondent and his co-investors had the same right of discharge that the plaintiffs had in the Woodward case. The basic reason for said conflict between the Court of Appeals for Eighth Circuit with that for the Tenth Circuit, is the opposing interpretations made by those courts of the opinion in *S.E.C. v. Howey Co.*, 328 U.S. 293.

3. If respondent is entitled to any recovery in this case at all, then the very important issue is posed of whether he is limited to the amount allocated by the agreement of the parties to acquisition of leasehold interests. On this issue there is a square-toed conflict between the court below and the Supreme Court of Illinois. The court below has ruled in *Whittaker v. Wall*, 226 F.2d 868, and in the instant case that no distinction should be recognized between acquisition cost and development expenses. In the case of *Hammer v. Sanders*, 8 Ill. 2d 414, 134 N.E.2d 509, cert. den. 352 U.S. 878, the Illinois Supreme Court ruled directly to the contrary and held that a distinction must be recognized between the cost of acquiring the security and the cost of development. This issue has never heretofore been passed upon by the Missouri Supreme Court but is squarely presented and will be decided in *Covert v. Cross*, No. 47,462.

4. The trial court in its supplemental findings dated August 13, 1959, ruled that respondent's purported tender did not comply with the requirements of Missouri law, holding in this respect:

> "It is the conclusion of the court that such tender was not sufficient under the statutes of Missouri, or under the Federal Securities Act." (App., p. A22).

This conclusion was proper and inevitable under the law of Missouri regarding the general subject of tender, as shown by the following Missouri decisions: *Long v.*

Greene County Abstract and Loan Co., 205 Mo. 158, 158 S.W. 305, l.c. 308-309; *Mendell* v. *Howard*, 200 Mo. App. 427, 208 S.W. 497, l.c. 498; *Landis* v. *Saxon*, 89 Mo. 375, 1 S.W. 359; *Knollenberg* v. *Nixon*, 171 Mo. 445, 72 S.W. 41; *McGuire* v. *Brockman*, 58 Mo. App. 307.

Nevertheless, the court below refused to accept said finding by the trial court and instead held that the Missouri decisions on the subject of tender generally are inapplicable since they are not specifically referable to the Blue Sky Law. The court below then proceeded to rule this case on the basis of non-Missouri decisions. We submit that said action by the court below was improper and that it should have applied the general Missouri law on what constitutes a sufficient tender. There is no reason to believe that the Missouri legislature intended a tender under the Blue Sky Law to be different or lesser in character than what is required of a tender in any other proceeding under Missouri law.

5. With respect to the defense of estoppel, the court below dismissed the issue with the summary statement that said defense was "without merit." (Appendix, page A17). If by this the court below meant that estoppel cannot be a defense to an action under the Blue Sky Law, then the court below is in conflict with the decision of the Missouri Supreme Court in *Gales* v. *Weldon*, 282 S.W.2d 522, l.c. 528. If the court below meant that estoppel was not supported by the evidence, then it is in conflict with the decisions in *DeLamar Mines* v. *Mackay*, 104 F.2d 271 (C.A. 9), and *Grabendike* v. *Adix*, 335 Mich. 128, 55 N.W.2d 761. If the court below meant that the defense of estoppel was not affirmatively pleaded, then the court has ignored the provisions of the Federal Rule of Civil Procedure 15 (b), which provides that the pleading shall be automatically conformed to evidence received without objection.

The issue of estoppel is presented in and will soon be ruled by the case of *Covert* v. *Cross*, now pending before the Missouri Supreme Court *en banc*.

CONCLUSION.

This case and the Covert case now pending under submission to the Missouri Supreme Court *en banc* are essentially two parts of a single proceeding. They involve the same transactions and the same documents. Accordingly, consideration of the instant petition should be deferred, if possible, until the Covert case is decided by the Missouri Supreme Court *en banc*. If the Missouri Supreme Court should sustain petitioner's contentions, then the decision below should be reversed summarily for the reason that the issues involved arise under a state statute and present questions of state law on which the decision of the highest court of Missouri is controlling. Petitioner will, of course, advise this court immediately of the decision by the Missouri Supreme Court in the Covert case just as soon as it is announced.

Respectfully submitted,

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